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TOO ATTENTIVE TO OUR DUTY: THE FUNDAMENTAL CONFLICT UNDERLYING HUMAN RIGHTS PROTECTION IN THE UK

Introduction

The position of human rights in the UK since the creation of the Human Rights Act 1998 (HRA) has been characterised by a lack of popular acceptance, and calls from both sides of the political spectrum for either its repeal, or the amendment of it to give a greater place to duties and responsibilities within it.¹ Its place within the UK's slowly and incrementally evolving constitution² is uncertain and precarious. I will suggest that underlying this is a fundamental conflict between the conception of the individual which the European Court of Human Rights (ECtHR) has stated as the basis of the European Convention on Human Rights (ECHR), and the idea of the individual which has historically formed the basis of the UK Constitution. Whereas the Strasbourg court has recognised the Convention as ultimately protecting the capacity to freely choose how to live, the core principles of the UK Constitution have long been grounded in the idea of the individual as a subject defined by the duties they owe. Using the case law of the ECtHR and the UK courts, I will show how recognising this underlying tension between these two conceptions of the individual gives a greater understanding of the position and judicial interpretation of the Convention rights in the UK.

¹ Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (London: Ministry of Justice, 2012) paras 88(v) & (vii); Ministry of Justice, *Rights and Responsibilities: Developing our Constitutional Framework* (Cm 7577) paras 2.15, 2.17 & 2.20; and The Conservative Party 'Protecting Human Rights in the UK' (*The Conservative Party* 2014) pp 4 & 5; available at https://www.conservatives.com/~media/files/downloadable%20Files/human_rights.pdf (accessed 30 August 2015).

² J Laws *The Common Law Constitution* (Cambridge: CUP 2014) pp 6-9 & 90.

According to the ECtHR, the foundation from which the authority of the ECHR derives and which its substantive requirements protect, is the capacity of individual human beings to choose how to live and through their choices define their own identity. Following a series of cases this was recognised directly by the ECtHR in *Pretty v UK*.³ I will begin by showing that the place of this conception of the individual as underlying the Convention is supported by the rights theories of Kai Möller,⁴ James Griffin⁵ and Ronald Dworkin.⁶

The UK Constitution is not founded upon this conception of the individual. I will show how the core constitutional tenets, parliamentary sovereignty and the rule of law, historically derive from a fundamental conception of the individual as one defined by the duties they owe, not their capacity for freedom of choice. In contrast to America and France, which rejected duty-based constitutions in the 18th Century Enlightenment, the foundation of the UK Constitution has only slowly and incompletely evolved to recognise individuals as primarily and inherently possessing the freedom to choose how to live. Through legislation including the Representation of the People Acts and the devolution Acts, and the judicial development of constitutional principles, such as civil liberties, the principle of legality and the tentative statements in *R (Jackson) v Attorney General*,⁷ increased constitutional recognition and protection has been given to a different conception of the individual. Using the cases of *R (Purdy) v DPP*⁸ and *R (Nicklinson) v Ministry of Justice*⁹ I will argue that this slow evolution was artificially and controversially accelerated by the creation of the HRA and the effect domestic courts have given to Strasbourg jurisprudence under it. I will show that acceptance of this distinct basis for Convention rights has not been universal amongst the UK judiciary, and differences between the foundational conception of the individual assumed

³ (2002) 35 EHRR 1.

⁴ K Möller *The Global Model of Constitutional Rights* (Oxford: OUP, 2012).

⁵ J Griffin *On Human Rights* (Oxford: OUP, 2008).

⁶ R Dworkin 'Is there a right to pornography?' (1981) 1(2) OJLS 177.

⁷ [2005] UKHL 56.

⁸ [2009] UKHL 45.

⁹ [2014] UKSC 38.

and applied by different judges substantively influence their interpretations of the Convention rights.

The HRA has precipitated a direct conflict between the choice foundation for the Convention rights the ECtHR had recognised, and the conception of the individual as defined by the duties they owe which remains the foundation of the central principles of the UK Constitution. Recognising this collision of the underlying tectonic plates of the Convention and Constitution beneath the place of the HRA within the UK legal order and in judgments under it, explains at the most fundamental level the criticism of the HRA, and the calls for a replacement bill of rights which gives a more prominent place to ideas of individual duty and responsibility. Acknowledging this leads to the conclusion that, for the Convention's requirements and its application to be fully embraced in the UK, it must be understood and accepted as introducing to the UK not only new laws, but with them a different foundation for law, a different conception of the individual.

The Foundation of the Convention Rights

In stating that it gives effect to the non-legally binding Universal Declaration of Human Rights 1948 in its preamble, the ECHR claims to have legitimacy and authority not deriving solely from substantive law. Consequentially, the nature of the Convention's theoretical foundation is of fundamental importance to the justification and interpretation of the substantive rights it contains. In line with other national and international rights documents, the Convention's fundamental foundation has been argued by theorists and recognised by the ECtHR to be the human capacity to choose what purposes to pursue in life, through which an individual defines their identity.

Working back from the shared characteristics¹⁰ of the predominant model of national and international human rights protection,¹¹ Möller identifies the ‘protected interests conception of autonomy’ as the underlying central principle which fits their features.¹² He argues that the Convention and other rights documents practically protect a person’s control over their body and their choices as to how to live their life.¹³ As a part of this global model of rights protection, Möller argues that the ECtHR has interpreted the Convention as grounded in protecting an individual’s capacity for ‘existential self-understanding’:¹⁴ their view of who they are and their choices through which they shape and manifest this.¹⁵ Similarly, Griffin argues that what ultimately underlies the modern ‘Western-inspired discourse of human rights’, of which the Convention is a part, is the unique capacity of human beings to create their own identities through autonomous choices.¹⁶ Thus he claims the content of the idea of human dignity – which the UN rights documents use as a ‘place holder’ term, which is not stated to have specific content, encompassing any basis claimed for human rights in the characteristics of the human person¹⁷ – ‘what we attach value to, . . . is our capacity to choose and to pursue our conception of a worthwhile life’.¹⁸

Although there is no statement of such a basis in the Convention’s preamble and, as I will show, it is at odds with the conception of the nature and purpose of the Convention which influenced the UK government’s significant contribution to its drafting,¹⁹ it is the basis that the ECtHR has recognised as fundamentally underlying and justifying the Convention

¹⁰ Möller, above n 4, pp 3, 5, 10 & 13. The core features he identifies are: rights inflation, the protection of positive and socio-economic rights not just negative rights, the horizontal and vertical effect of rights, and the subjection of the vast majority of rights to a balancing and proportionality test.

¹¹ Ibid, pp 15-16, 20, 30-33, 35 & 37-39.

¹² Ibid, pp 63-71.

¹³ Ibid, p 58.

¹⁴ Ibid, p 59.

¹⁵ Ibid, pp 60-61.

¹⁶ Griffin, above n 5, pp 26, 31-33.

¹⁷ Ibid, p 45, C McCrudden ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19(4) EJIL 655 at 677, 680 & 697. cf B Douglas ‘Undignified Rights: The Importance of a Basis in Dignity for the Possession of Rights in the United Kingdom’ [2015] PL 241; and T Hannant ‘Still undignified rights: a disagreement with Benedict Douglas’ [2016] PL 555.

¹⁸ Griffin, above n 5, p 44.

¹⁹ Below text to n 108.

rights. In the case of *Pretty v UK* court stated that '[t]he very essence of the Convention is respect for human dignity and human freedom.'²⁰ In recognising that 'the notion of personal autonomy is an important principle underlying the interpretation of' Article 8,²¹ the court accepted the applicant's submission that the protection of 'self-determination runs like a thread through the Convention as a whole'.²² In relying upon this as a foundation to support its interpretation of the scope of Article 8, the court held that the right and by implication the whole Convention protected 'individual autonomy',²³ the capacity 'to conduct one's life in a manner of one's own choosing'.²⁴

The ultimate recognition of this basis in *Pretty* was the fruition of the invocation of a deeper basis for the Convention in the universal defining characteristic of the individual, to justify interpretations of the rights, begun in *Tyrer v UK* and developed in *SW & CR v UK*.²⁵ In *Tyrer* the ECtHR held that it was contrary to 'human dignity and physical integrity' to subject an individual to corporal punishment. The court reached this conclusion on the basis that such treatment, for the duration of its application, degrades an individual into 'an object in the power of the authorities',²⁶ removing any capacity as a being capable of choice.²⁷ This justification was further developed as a broader basis for the Convention in *SW*. Here the Grand Chamber held that the 'very essence' of the 'fundamental objectives' of the Convention was the respect for 'human dignity and human freedom'.²⁸ Using this as a basis to interpret whether Article 7's ban on retrospective criminal offences was violated by the recognition of a new Common Law offence, the ECtHR held that the law's development by

²⁰ *Pretty*, above n 3, at [65].

²¹ *Ibid*, at [61].

²² *Ibid*, at [58].

²³ *Ibid*, at [61].

²⁴ *Ibid*, at [62].

²⁵ *Tyrer v UK* (1979-80) 2 EHRR 1; *SW & CR v UK* (1996) 21 EHRR 363; and J Christoffersen *Fair Balance Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Leiden: Martinus Nijhoff Publishers, 2009) pp 142-145.

²⁶ *Tyrer*, above n 25, at [33].

²⁷ *Ibid*; and Griffin, above n 5, p 33.

²⁸ *SW*, above n 25, at [44].

the courts to recognise rape within marriage as unlawful did not violate the Convention.²⁹ Both cases recognised and protected the capacity of individuals as beings with the capacity for choice. The subsequent recognition that the Convention was ultimately grounded in this capacity for choice in *Pretty*, was confirmed by the Court in *Goodwin v UK*.³⁰ Here again the court elided ‘human dignity and human freedom’ in holding that the Convention protects ‘the personal sphere of each individual, including the right to establish details of their identity as individual human beings.’³¹

Thus the ECtHR has affirmed that the capacity to choose how to live described by Möller and Griffin is the basis of the Convention as a whole. All the Convention rights can be interpreted as protecting the manifestation of this capacity in various forms. Rights such as Freedom of Expression in Article 10, directly protect the pursuit of particular substantive purposes an individual has chosen.³² Whilst others protect characteristics and conditions which are implicitly necessary for the exercise of the capacity to choose how to live. Thus life, protected by Article 2, is the most basic characteristic which must be respected and protected for individuals to be able to choose how to act.³³ More procedural rights, such as the Article 6 right to a fair trial, are essential to ensuring that a person is not unjustly restricted in their ability to pursue their life choices.

Article 8 is the right which has been used most directly and openly by the ECtHR to give protection to the capacity for self-defining choice. This Article states a right to respect for a list of protected interests: a person’s private and family life, their home and correspondence.³⁴ In spite of the Convention’s attempt to specify the interests Article 8 protects, the overlap it has been held to have with the protection given by many of the other

²⁹ Ibid, at [44]-[45].

³⁰ *Goodwin v UK* (2002) 35 EHRR 18.

³¹ Ibid, at [90].

³² D Beyleveld ‘The Principle of Generic Consistency as the Supreme Principle of Human Rights’ (2012) 13 HRR 1 at 7.

³³ Möller, above n 4, p 88.

³⁴ Article 8 ECHR.

Convention rights shows it to be the most interpretively open right.³⁵ The reason for this overlap is that, whilst other Convention rights can be seen to protect individual's choices by prohibiting certain types of compulsion or coercion, and facilitating the exercise of particular choices,³⁶ Article 8 has been uniquely interpreted by the ECtHR as 'most explicitly' giving protection to the substantive and open manifestation of the capacity for identity defining choice.³⁷ Thus in *Von Hannover v Germany (No.2)* Article 8 was described as protecting 'the development . . . of the personality of each individual' through their free choices as to how to live, encompassing their 'personal identity,'³⁸ going beyond just protecting their personality in a narrow sense.³⁹ This has enabled it to be used by the court to fill in the gaps where other more specific Convention rights do not clearly protect an individual's particular expression of their identity.⁴⁰ Thus in *Goodwin* the ECtHR applied it to interpret Article 8 as protecting a right to have one's choice of gender recognised.⁴¹

30 years prior to *Pretty*, Ronald Dworkin argued that the protection of individual capacity to choose how to live must underlie the substantive human rights protected by any legal system committed to the equality of individuals.⁴² In the context of trying to conceptualise the limits of freedom of expression, he contended that detailed substantive statements of rights protect an individual's more abstract 'right to moral independence.'⁴³ If a society sees all individuals as of equal value it must recognise that their life choices are equally valid, though they must be weighed and balanced against each other where they

³⁵ *Al Nashiri v Poland* (2015) 60 EHRR 16 (Articles 3, 5 & 8); *Mizzi v Malta* (2008) 46 EHRR 27 (Articles 6 & 8); *Sanchez Cardenas v Norway* (2009) 49 EHRR 6 (Articles 6 & 8); *Hoffmann v Austria* (1994) EHRR 293 (Articles 8 & 9); *Pay v United Kingdom* (2009) 48 EHRR SE2 (Articles 8 & 10); *Segerstedt-Wiberg v Sweden* (2007) 44 EHRR 2 (Articles 8, 10 & 11); *Dickson v United Kingdom* (2007) 44 EHRR 21 (Articles 8 & 12); and *Merger v France* (2006) 43 EHRR 51 (Article 8 and Article 1 of Protocol 1).

³⁶ Möller, above n 4, p 88 reaches the same conclusion with his conception of autonomy reductively derived from the Global Modal of Constitutional Rights.

³⁷ *Pretty*, above n 3, [58]; and *ibid*, pp 63 & 88.

³⁸ *Von Hannover v Germany* (2012) 55 EHRR 15 at [95].

³⁹ Möller, above n 4, pp 59-60.

⁴⁰ *Ibid*, pp 62, 79 & 88.

⁴¹ *Goodwin*, above n 30, at [90]-[91].

⁴² Dworkin, above n 6, at 205.

⁴³ *Ibid*, at 194 & 199.

conflict to determine the extent to which their pursuit should be respected.⁴⁴ Thus Dworkin recognised, as Möller, Griffin and the ECtHR have subsequently, that human rights protect an individual's freedom of choice as to how to live their lives.⁴⁵

Dworkin and Neil McCormick respectively labelled this theoretical foundation in the capacity to choose how to live as the 'rights basis' and 'will theory' understanding of human rights.⁴⁶ They distinguished it from 'duties based' and 'interest' theories, neither of which have the protection of the capacity for freedom of choice as their fundamentally basis; rather the former views individuals as beings fundamentally bound to comply with a code of behaviour, and the latter defines them as bound to act in a way which respects the favoured interests of others.⁴⁷ It will be my central argument in the middle section of this article that the basis of the UK Constitution is not a conception of the individual fundamentally defined by their capacity to freely choose how to live; instead it has long defined people in terms of the duties they owe. I will argue that this is why the HRA, in incorporating Convention rights interpreted by the ECtHR as protecting a conception of the individual fundamentally defined by the capacity for choice, has faced hostility. For the sake of clarity and consistency with the language of the ECtHR, and the commonality of the capacity for choice to both Dworkin and McCormack's descriptions, I will continue to use the term choice-basis for what they label the 'rights' and 'will' foundation for rights.

The Convention's Basis as the Source of the HRA's Controversy

Understanding the Convention as grounded in protecting the individual's capacity for choice is vital to understanding why it has attracted such controversy in the UK, and most

⁴⁴ Ibid, at 205-206 & 211-212.

⁴⁵ Ibid, at 194.

⁴⁶ R Dworkin *Taking Rights Seriously* (London: Duckworth, 1997) p 172; and N MacCormick 'Rights in Legislation' in P Hacker and J Raz (eds) *Law, Morality and Society* (Oxford: Clarendon Press, 1977) p 192.

⁴⁷ Ibid.

vehemently in England.⁴⁸ It explains at a fundamental level the precarious position of the HRA. This is not merely a product of the politically sensitive circumstances in which Convention rights have been invoked by unpopular minorities.⁴⁹ Rather, it reveals a deeper conflict between the basis of the Convention recognised by the ECtHR, and the different basis which has long underpinned the UK Constitution. The UK's history has resulted in a Constitution grounded upon a conception of the individual as ultimately defined by the duties they owe, rather than their capacity for choice and the substantive choices they make. Although this basis of the UK Constitution has been partially eroded over the centuries by claims for individual freedom, the incorporation of a rights regime interpreted by the ECtHR as rooted in the capacity to freely choose how to live, is a direct challenge to the duty foundation.

The Foundation of the UK Constitution

The distinguishing characteristic of a constitution or moral theory underpinned by a duty conception of the individual is that its basis is not the capacity of the individual to choose how to live their life.⁵⁰ Duty-based theories state a different conception of the individual.⁵¹ They view the individual not as inherently possessing the freedom to choose, but as defined by the capacity to owe duties which circumscribe their permissible actions, their identity thus deriving from their obligations not their choices.

That the UK Constitution has not developed a basis for law or conception of human rights founded in the individual capacity for freedom of choice, and instead conceptualises

⁴⁸ Commission on a Bill of Rights, above n 1; and below text to n 104.

⁴⁹ eg A Wagner and H Chapman 'The 14 Worst Human Rights Myths' (*Rights Info*); available at <http://rightsinfo.org/infographics/the-14-worst-human-rights-myths> (accessed 19 October 2016); and S. Chakrabarti *On Liberty* (London: Penguin 2015) pp 92-93 & 132-133.

⁵⁰ M Kramer 'Rights Without Trimmings' in M Kramer and others (eds) *A Debate Over Rights* (Oxford: Clarendon Press, 1998) pp 61-62.

⁵¹ Dworkin, above n 46, p 172; and MacCormick, above n 46, p 192.

people fundamentally as duty holders, is a product of its history. Walter Bagehot in his Victorian analysis of the English Constitution recognised this.⁵² Arguing that the influence of the history of England upon the ‘common idea [of the nature of our national] character cannot be exaggerated’,⁵³ he described the people of 19th Century England as ‘a deferential nation’ who fundamentally see their relationship with the power of the state as defined by the duty they owe to the queen.⁵⁴ He stated ‘our constitution is not based on equality . . . but upon certain ancient feelings of deference’⁵⁵ of individuals to state power, rooted in the easily grasped notion of a duty owed to the monarch who was divinely anointed by God to rule⁵⁶ whom Christian subjects had a duty to obey.⁵⁷ Thus for Bagehot the defining characteristic of the individual under the Constitution, whose principles govern the whole UK, not just England, was to be capable of bearing duties.

The UK Constitution’s core principles are unchanged from Bagehot’s time and continue their adherence to a duty foundation. Parliamentary Sovereignty, the sovereignty of the Queen in Parliament, ‘the most fundamental rule’ of UK constitutional law,⁵⁸ places a duty on all to obey the will of Parliament.⁵⁹ There are ultimately no constitutional grounds on which citizen or court can hold themselves not to be bound to conform to Parliament’s laws.⁶⁰ The other central tenant of the UK Constitution is the Rule of Law.⁶¹ But at its core this too

⁵² W Bagehot *The English Constitution* (first published 1867, Oxford: OUP, 2001).

⁵³ Ibid, p 190.

⁵⁴ Ibid, p 192.

⁵⁵ Ibid, p 199. cf above text to n 42.

⁵⁶ Ibid, pp 28 & 41-42.

⁵⁷ A Pagden *The Enlightenment* (Oxford: OUP, 2013) pp 250-254; and D Orton ‘Royal Piety and Davidic Imitation: Cultivating Political Capital in the Alfredian Psalms’ (2015) 99 *Neophilologus* 477 at 478, 480-481, 485 & 489-490.

⁵⁸ *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) at [20], cf *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 at [43] ‘Parliamentary sovereignty is a fundamental principle of the UK constitution...’ (my emphasis).

⁵⁹ *Miller* EWHC, above n 58, at [20] & [22].

⁶⁰ *R v Secretary of State for Transport, ex p Factortame Ltd (No2)* [1991] 1 AC 603 at 658-659; *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) at [62]-[64]; *R (Countrywide Alliance) v Attorney General* [2007] UKHL 52 at [112]; *Miller* EWHC, above n 58, at [20] & [22]; and J Laws ‘Constitutional Guarantees’ (2008) 29(1) *Stat L R* 1, at 3, 6-7 & 10.

⁶¹ T Bingham *The Rule of Law* (London: Penguin, 2011) p 160.

states only that all are ‘bound by and entitled to the benefits of [the] laws’;⁶² all have a duty to obey the laws. These constitutional features embody a fundamental foundation in a conception of the individual, who until 1949 was referred to as a subject not a citizen,⁶³ defined by the duties they owe, not one whose fundamental value is their capacity to choose how to live and through their choices define their own identity.

The influence of this underlying conception of the individual, as part of a constitution centred on deference to power, was recognised by JAG Griffith in his analysis of the interests protected by the judiciary. He characterised judges as most fundamentally perceiving themselves to be under a duty to obey the law, regardless of the content of the law.⁶⁴ This he argued, led them to routinely prioritise obedience to the law over the ‘liberty’, the freedom of choice, of the individual.⁶⁵ The concept of civil liberties, which prior to the HRA gave protection against the state to some of the interests now safeguarded by the Convention rights, is consistent with this. It embodies the protection of a conception of an individual defined by duties, not their capacity to freely choose how to live. The kernel of the UK civil liberties idea is that the individual is free to do anything the law does not prohibit.⁶⁶ But this is premised on the idea that an individual first and foremost has a duty to obey the state’s laws, only outside of what these prohibit are they free to act as they wish.⁶⁷ An individual’s freedom is only what remains after their legal duties and the duties of the courts to enforce the law are satisfied.

Outside the UK, a sharp departure from this duty-based foundation towards the choice-based foundation of rights and constitutions, and ultimately the ECtHR’s interpretation of the

⁶² Ibid, p 8.

⁶³ British Nationality Act 1948.

⁶⁴ JAG Griffith *The Politics of the Judiciary* (London: Harper Collins, 5th edn, 1997) pp 296-297 & 338-339.

⁶⁵ Ibid, pp 297 & 339.

⁶⁶ *Malone v Metropolitan Police Commissioner* [1979] Ch. 344 at 357; and *Countryside Alliance*, above n 60, at [112].

⁶⁷ T Hobbes *Leviathan* (first published 1651, Cambridge: CUP, 1996) pp 147-14 & 152.

Convention rights, can be traced to the Enlightenment.⁶⁸ This 18th Century intellectual movement was characterised by a critique of the feudal and religious duties which dictated the course of people's lives.⁶⁹ As part of this, some societies moved towards increased individual freedom of thought and reason,⁷⁰ and recognised claims of rights to these things, free from the previous proscriptive duties.⁷¹ These ideas were given effect to in the revolutions of America and France.⁷² The statements of individual freedom and *liberté* prominent in their revolutionary statements of rights are not mere rhetorical devices. They are the expression of a desire to establish a different relationship between the individual and the state, one where individual freedom of choice as to how to live is the foundation of the law, not duty to state or sovereign.⁷³ Thus the American Declaration of Independence proclaims

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, governments are instituted among men, *deriving their just powers from the consent of the governed*; that, whenever any form of government becomes destructive of these ends, *it is the right of the people to alter or to abolish it*, and to institute a new government. (my emphasis)

Their starting point for the authority of the state and its laws was individual freedom of choice as to how to live, not an unbreakable duty to the sovereign.⁷⁴ With this, in these legal systems, came the idea that rights protecting this freedom were inalienable to the individual.⁷⁵

⁶⁸ M Ishay *The History of Human Rights* (London: University of California Press 2008) p 64.

⁶⁹ Ibid, pp 71-72.

⁷⁰ Pagden, above n 68, pp 2, 4 & 15-16.

⁷¹ N Hampson *The Enlightenment* (London: Penguin, 1990) p 252; Ishay, above n 68, p 69; and ibid, p 15.

⁷² Ishay, above n 68, pp 65 & 75; and Hampson, above n 71, pp 256.

⁷³ Ishay, above n 68, pp 75 & 94.

⁷⁴ Pagden, above n 57, pp 254-255.

⁷⁵ Douglas, above n 17, at 245.

Conversely, in the UK, the duty conception of the individual influenced the contemporaneous rejection by Jeremy Bentham and Edmund Burke of the idea that individuals could or should have rights which overrode their duty to obey the sovereign.⁷⁶ Bentham famously stated the idea of such rights were ‘nonsense on stilts’, because rights are ‘the children of the law’ and had no deeper basis beyond their grant by the state to the individual.⁷⁷ Instead he perceived the ‘habit of obedience’ of individuals as the foundation for government, law, rights and liberties.⁷⁸ Similarly, Burke argued that such rights would be a disruptive departure from the UK’s prevailing constitutional order.⁷⁹ He rejected the French revolutionary idea that individuals have inalienable ‘rights of man’, including the right to choose their governors,⁸⁰ as incompatible with the Constitution ‘inherit[ed] from our forefathers’, which he maintained gave sufficient protection to the liberties and rights of the individual.⁸¹

As there was no sudden revolution and shift to a choice-based conception of the individual as a foundation for the law, the Enlightenment conception of the individual was not openly adopted in the UK with a clear rejection of the duty understanding of the individual. Rather the Enlightenment ideal of the individual as defined by choice has only slowly and incompletely permeated the UK Constitution.

Unsuccessful Challenges to the Duty Basis

Alan Macfarlane claims that protection of English individual liberty can be traced to the 13th Century; with increasing protections for land ownership from that time bringing with

⁷⁶ Ibid, at 246.

⁷⁷ J Bowring (ed.) *The Works of Jeremy Bentham* (Edinburgh: William Tait, 1843) Vol.II, p 51 & Vol.III, pp.160 and 185.

⁷⁸ Ibid, p 50.

⁷⁹ E Burke *Reflection on the Revolution in France* (first published 1867, London: Penguin, 2004) p 148 & 152.

⁸⁰ Ibid, pp 97-100 & 104.

⁸¹ Ibid, pp 117-119 & 151.

it greater protection for the freedom of the individual to choose how to live compared to continental Europe.⁸² Indeed, he argues that the US Declaration of Independence is a manifestation of exported English individualism.⁸³ In a sense he is correct, claims and laws for the protection of the freedom of the individual have been made throughout the UK's history; Burke gives the Magna Carta 1215 and the Declaration of Right 1689 as examples.⁸⁴ However, these have never amounted to the clear recognition of the capacity of the individual to choose how to live as the basis of the UK Constitution. The protection of individual freedom of choice Macfarlane describes came with property ownership, and was therefore not inalienable to the individual, and could not override the ultimate duty to obey the sovereign. This is illustrated by the necessity of landownership in order to vote until 1918 for men, and 1928 for some women, and echoes still in the UK political trope of a property owning democracy.⁸⁵

There have been calls and movements for the recognition of a different basis for the Constitution over the centuries, but these are notable because they are exceptions and direct challenges to the duty basis. John Wilkes writing in the 18th Century argued for the disentanglement of liberty from property, and a system of government grounded in an idea of the individual defined by choice. He brought the first motion in the House of Commons for universal male suffrage, and defended the freedom of the press to criticise the government and the King from a foundation that argued that it and the liberty it defended was the 'birthright of a Briton'.⁸⁶ Although he had popular support in London and the emerging United States, he was writing in a time in which the monarch played an active role in politics,

⁸² A Macfarlane *The Origins of English Individualism* (Oxford: Blackwell, 1994) pp 165-166 & 197.

⁸³ Ibid, pp 202-203.

⁸⁴ Burke, above n 79, pp 117-119.

⁸⁵ Representation of the People Act 1918 & Representation of the People (Equal Franchise) Act 1928.

⁸⁶ J Wilkes, *North Britain No.1* (London, 5 June 1762); P Thomas, *John Wilkes: A Friend to Liberty* (Oxford: Clarendon Press, 1996) pp 19 & 214; and A Cash, *John Wilkes: The Scandalous Father of Civil Liberty* (London: Yale University Press, 2006) pp 3, 68, 82 & 348-349.

and he was not able to bring about a change to the Constitution's duty basis.⁸⁷ Nonetheless, with the members of his Bill of Rights Society, he challenged the basis of the Constitution, stating his loyalty was to Great Britain not the King's person,⁸⁸ rejecting the view that 'the people were made entirely for the sovereign and that he had a right to dispose of their fortunes, lives and liberties' at will.⁸⁹ Wilke's contemporary Thomas Paine was ultimately outlawed for his challenges to the duty basis of the Constitution. Openly disagreeing with Burke, he described the position of the individual under the Constitution as one of subjugation and argued for a 'new order of thoughts', a new understanding of the individual as inalienably possessing the right to choose how to live, with duties being only the secondary corollary of this right.⁹⁰

Against this background, consistent with Macfarlane's subsequent analysis, at the beginning of the 20th Century AV Dicey claimed that English history was founded on 'individualism'.⁹¹ He argued that history and the influence of Bentham's thinking, made the *laissez faire* liberty of the individual the grounding of statesmanship in the Victorian era, and parliament reluctant to create laws which restricted individual freedom.⁹² However, he also recognised that parliamentary sovereignty meant that the individual ultimately had to obey any law parliament created.⁹³ Thus although he argued that the legal order strongly valued freedom, his understanding of the UK Constitution rested on an idea of the individual as ultimately defined by duty.

⁸⁷ Thomas, above n 86, pp 219 & 220; and R Postgate *That Devil Wilkes* (London: Constable, 1930) pp 169 & 172.

⁸⁸ Cash, above n 86, p 76.

⁸⁹ J Wilkes, *North Britain No.33* (London, 15 January 1763); Ibid, p 79; and Thomas, above n 86, pp 113, 122 & 216.

⁹⁰ T Paine *Rights of Man, Common Sense and Other Political Writings* (first published 1791, Oxford: OUP 1995) pp 123, 142, 144, 249 & 398.

⁹¹ AV Dicey *Law and Public Opinion in England* (London: Macmillan 1962) pp xc-xci.

⁹² Ibid, pp xxix xxx & lxxi.

⁹³ AV Dicey *An Introduction to the Study of the Law of the Constitution* (London: Macmillan 1959) pp 42, 62, 207-208 & 239-240; and Dicey, above n 91, p xc.

The Partial Erosion of the Duty Basis

In both the common law and legislation, the conception of the individual defined by choice has however gradually influenced ‘the relationship between the ruler and the ruled’ within the UK Constitution.⁹⁴ The extension of the voting franchise to all non-property owning men and women,⁹⁵ was a fundamental recognition of the capacity of free choice of all individuals. For Sir John Laws the judicially developed principle of the ‘presumption of liberty’, which entails that ‘every interference with the freedom of the individual stands in need of objective justification’,⁹⁶ shows a commitment to the Enlightenment ideal of freedom of thought.⁹⁷ In the case law, protection for this capacity for individual choice can be seen in the application of the common law ‘principle of legality’, which requires that if Parliament wants to infringe an important aspect of individual freedom it must do so with the clearest of words, or the courts will interpret ambiguous legislation in the way which maximises individual freedom.⁹⁸ More significantly and more tentatively, in *obiter* comments in *Jackson* Lords Steyn and Hope discussed the possibility that a situation might arise where the judiciary may hold themselves not to be duty bound to enforce an Act of Parliament.⁹⁹ Building on the principle of legality’s protection for individual freedom, they considered it possible that the courts would not give effect to a statute which deprived individual rights of judicial protection and might recognise a ‘different hypothesis of constitutionalism’,¹⁰⁰ a different foundation for the Constitution.

In the political context, some recent invocations of the *Magna Carta* show the influence of the Enlightenment conception of an individual as defined by their freedom of

⁹⁴ J Laws ‘The Good Constitution’ (2012) 71(3) CLJ 567 at 567.

⁹⁵ Above n 85.

⁹⁶ *R (Wood) v Commissioner of Police of the Metropolis* [2009] EWCA Civ 414 at [21].

⁹⁷ Laws, above n 2, p 43; and Laws, above n 94, at 581.

⁹⁸ *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 at 130 & 131; and Laws, above n 60, at 7.

⁹⁹ *Jackson*, above n 7, at [102] & [159].

¹⁰⁰ *Ibid*, at [159].

choice. In the *Magna Carta* the limits on the king's power are justified on the grounds that they were part of the divinely appointed dutiful monarch's responsibilities to God.¹⁰¹ But modern reinterpretations of it within the UK and abroad view it as protecting the fundamental freedom of the individual.¹⁰²

More concretely in Northern Ireland, Scotland and Wales, where power has been devolved to regional legislatures,¹⁰³ there is not the lack of acceptance of the Human Rights Act that is found in England.¹⁰⁴ This is at least in part a consequence of the fact that the HRA was created at the same time as the devolved legislatures and their powers were made subject to it.¹⁰⁵ The people of these parts of the UK therefore constitutionally conceptualise themselves, through their relationship with the state, as beings under law defined by their capacity for choice, not as subject-citizens constitutionally characterised as bound by a duty to obey all law. Through the exercise of their choice in referenda they agreed to the creation of the devolved assemblies, and to this basis those assemblies via the Convention rights are made subject. It is too early to judge whether the choice over how to be governed given in the Brexit referendum will similarly change how the people of England understand themselves and their relationship with the state. It may be that other elements of the history of the devolved nations and their relationship England may have a significant impact on the population's understanding of the nature of the individual and their relationship with the state in those nations.¹⁰⁶ The language of 'taking back control' used during the Brexit referendum campaign can be seen to appeal to individual's desire to have greater freedom of choice over their own lives. However, the slogans of reasserting domestic 'sovereignty' can equally be

¹⁰¹ *Magna Carta* (Runnymede, 1215) at preamble and [61] (*The British Library*); available at <https://www.bl.uk/magna-carta/articles/magna-carta-english-translation> (accessed 31 October 2016).

¹⁰² Bingham, above n 61, pp 12-13.

¹⁰³ Government of Wales Act 1998; Northern Ireland Act 1998; and Scotland Act 1998.

¹⁰⁴ Commission on a Bill of Rights, above n 1.

¹⁰⁵ Government of Wales Act 2006, s 81; Northern Ireland Act 1998, s 24; and Scotland Act 1998, s 28(2)(d).

¹⁰⁶ Macfarlane, above n 82, p 165.

understood as appealing to dutiful loyalty to the UK Parliament and Queen over the law making bodies of the European Union.¹⁰⁷

In contrast to these movements towards recognising individuals as fundamentally defined by their capacity for choice, the duty-basis of the UK Constitution has characterised the attitude of UK governments to the Convention from the point of its creation. Government papers discussing its drafting evince a belief that UK law was already consistent with the Convention rights, and therefore individual application to a supranational court was unnecessary.¹⁰⁸ However, more significantly the 1950 Attlee government refused to accept the ECtHR's jurisdiction, because it 'might be used as a weapon of political agitation in the cold war and . . . might subvert the respect of dependent peoples [in the colonies] for the established imperial authorities.'¹⁰⁹ To allow the laws to be challenged by individuals the government felt would be inconstant with the UK's sovereignty.¹¹⁰ The government's assumption was that individuals ought to obey, not that they should be able to challenge the law in order to claim protection for their freedom.

Contemporaneous Cabinet papers indicate that the UK's position was not mere political expediency. They reflect the influence of understanding individuals in the UK as most fundamentally having a duty to obey the law, and not as fundamentally free. According to Lord Jowett the Lord Chancellor, who viewed the Convention as drafted from the perspective of *laissez faire* liberty from state control,¹¹¹ the Cabinet were of the view that the supranational enforcement of the Convention would 'jeopardise our whole system of law, which we have laboriously built up over the centuries, in favour of some half-baked scheme

¹⁰⁷ Vote Leave 'Taking Back Control from Brussels' (Vote Leave 2016); available at http://www.voteleavetakecontrol.org/briefing_control.html (accessed 7 February 2017).

¹⁰⁸ G Marston 'The United Kingdom's part in the preparation of the European Convention on Human Rights, 1950' (1993) 42(4) ICLQ 796 at 811 & 823-824.

¹⁰⁹ Ibid, at 806, 812 & 825.

¹¹⁰ Ibid, at 803-805; and E Wicks 'The United Kingdom Government's perceptions of the European Convention on Human Rights at the time of entry' [2000] PL 438 at 448.

¹¹¹ Marston, above n 108, at 813.

to be administered by some unknown court.’¹¹² The Attorney-General at the time stated that individual petition was ‘wholly opposed to the theory of responsible Government.’¹¹³ In the view of the UK government the Convention’s function was to prevent the totalitarian takeover of a state, to protect the conception of the democratic state as the government understood it,¹¹⁴ not to maximise the freedom of individuals within democratic states.¹¹⁵

Long before the ECtHR’s use of Article 8 to directly protect the choice of an individual as to how to live, the civil service expressed concerns that the broad scope of its protection might hinder the government’s economic plans.¹¹⁶ Article 8 was the only right in the Convention which was not present in the draft of the Convention proposed by UK civil servants.¹¹⁷ On the surface this reflects the historical lack of wide protection for privacy within UK law. But at a deeper level, when viewed alongside the government’s concern to preserve sovereignty, it reflects a desire to prevent ‘external interference with the [UK’s] internal government’,¹¹⁸ symptomatic of an understanding of its citizens as fundamentally subjects whose primary duty was to obey the law. Although the government’s fear that an individual petition system would diminish the UK’s state sovereignty was exaggeration,¹¹⁹ the challenge to the UK Constitution’s duty-basis from the ECtHR’s interpretation of the Convention as grounded in individual freedom, via the vector of the HRA, is fundamental.

The ECtHR recognises the Enlightenment idea of the individual as the foundation of the Convention rights, viewing them as attaching to a conception of a person defined by the capacity to freely choose how to live. That it is not the predominant conception of the individual underlying the UK Constitution is a consequence of the lack of any lasting

¹¹² Ibid, at 813 & 815; and Wicks, above n 128, at 446.

¹¹³ Marston, above n 108, at 816.

¹¹⁴ Wicks, above n 110, at 444.

¹¹⁵ Ibid, at 447-449.

¹¹⁶ Marston, above n 108, at 814.

¹¹⁷ Ibid, at 816.

¹¹⁸ Wicks, above n 110, at 445.

¹¹⁹ Ibid, at 449.

revolution against the state, overthrowing the established duty basis in favour of one grounded in the capacity of the individual for free choice. The Irish revolution and subsequent independence, resulted in the presence of elements of a choice conception of the individual within the Republic's Constitution.¹²⁰ However, it had no discernible effect on the foundations of the UK Constitution. This has been suggested to either reflect the perception of Ireland from Britain as not a full part of the United Kingdom and its departure as therefore of limited effect,¹²¹ or that the independence of the Republic reinforced the British identity in the post-WWI years rather than causing reflection upon it.¹²²

It is the nature of the UK common law constitution to evolve incrementally, with its central principles created and developing over time.¹²³ The duty-based foundation thus continues to permeate the UK Constitution and influence the understanding of rights. It is this that underlies the many criticisms of the HRA and suggestions for its replacement which emphasise its lack of mention of duties owed by individuals, and the need for their responsibilities as well as rights to be made clear. Both Labour and the Conservatives have called for the HRA's amendment or replacement to enshrine responsibilities which give expression to the citizen's duties¹²⁴ alongside rights. In a Green Paper the previous Labour Government argued that responsibilities were 'deeply woven into our social and moral fabric,'¹²⁵ and felt that the HRA focused too much on individual liberty to the exclusion of these.¹²⁶ The Conservatives have stated a desire to create a British Bill of Rights and Responsibilities, arguing this is necessary for human rights protection to be 'credible, just and

¹²⁰ P Hanafin *Constituting Identity: Political identity formation and the Constitution in post-independence Ireland* (Aldershot: Ashgate 2001) pp 1-2, 6-8, 10, 99-100 & 104-105.

¹²¹ J Paxman *Empire: What Ruling the World did to the British* (London: Viking 2011) pp 283-240.

¹²² D Powell *Nationhood and Identity: The British State since 1800* (London: IB Tauris 2002) pp 145, 149 & 151.

¹²³ Laws, above n 2, pp 6-9 & 30.

¹²⁴ Ministry of Justice, above n 1, p 9 & para 2.2.

¹²⁵ *Ibid*, para 2.16.

¹²⁶ *Ibid*, paras 2.15, 2.17 & 2.20.

command public support'.¹²⁷ To achieve this they have claimed that a new bill of rights must strike a more 'appropriate balance between individual rights and responsibilities to others.'¹²⁸ More general criticism of the HRA which argues that only those who fulfil their societal duties should have all their rights protected, excluding prisoners and some non-UK citizens who are deemed to have 'abdicated their responsibilities',¹²⁹ directly rejects a choice-basis.

That the HRA, the Convention rights, and Article 8 particularly are controversial is a symptom of a deeper conflict. It is not simply a result of the government now finding their actions and legislation substantively reviewed by the courts.¹³⁰ Rather it is a consequence of the underlying tension between the duty-based conception of the individual and their relationship to the state within the UK Constitution, under which a duty to obey Parliament remains sovereign, and the protection of the conception of the individual, defined by the capacity for choice as to how to live, that has been held to underlie the Convention rights.

The Stuttering Judicial Acceptance of the Choice-basis under the HRA

Although there have been many social and political changes over the centuries of the UK Constitution's evolution, the conception of the individual underpinning it, as defined by the duties they owe, persists. The critical political and public responses to the HRA show it to be the predominant prism through which the relationship of the individual and the state is viewed in the UK. With it the ECtHR's choice-based foundation for the Convention rights

¹²⁷ The Conservative Party, above n 1.

¹²⁸ Ibid, pp 4 & 5.

¹²⁹ D Green 'Refinement, not redefinition: What should be in the British Bill of Rights?' in R Shorthouse and J Dobson (eds) *Conservatism and Human Rights* (London: Bright Blue 2016) pp 46 & 44-45; Joint Committee on the Draft Voting Eligibility (Prisoners) Bill *Draft Voting Eligibility (Prisoners) Bill* Session 2013-14, HL 103/HC 924, 18 December 2013 (HMSO, 2013) paras 114-123; and Ministry of Defence *Single Departmental Plan: 2015-2020*, 19 December 2016 (MOD 2016) section 1.2; available at <https://www.gov.uk/government/publications/mod-single-departmental-plan-2015-to-2020/single-departmental-plan-2015-to-2020> (accessed 7 March 2017).

¹³⁰ Laws, above n 2, pp 82-83.

conflicts. The Labour party wished with the HRA to create a culture of rights in the UK,¹³¹ but this was not achieved simply by incorporating the Convention rights, it required a deeper shift in the conception of the individual upon which the UK Constitution sits.

The tremors of this tectonic tension between the foundation of the Convention and the Constitution are not confined to politicians' criticism of human rights. It shapes the approach of domestic judges to the interpretation of the substantive scope and requirements of the Convention rights. As I described in the previous section, the judiciary as the guardians of the UK Constitution have over time given effect to Enlightenment ideals,¹³² weaving strands of the idea of the individual as fundamentally possessing freedom of choice into its tapestry. The tension between duty and choice foundation is thus not entirely new to the UK Constitution, a recognition of individual capacity for freedom of choice has occurred in several aspects of the law. However, the Convention rights incorporation is controversial because, instead of slow judicial erosion of the Constitution's duty foundation through the Common Law's incremental method,¹³³ the HRA inadvertently effected a domestic imposition of this revolutionary conception of the individual, and enabled it to be used to challenge all existing law.

Some members of the domestic judiciary have progressively recognised and given effect to the choice-basis in their interpretation and application of the Convention rights. This development, and the resistance it encountered from judges applying a duty foundation, can be seen most clearly in cases concerning facts which bring moral questions close to the surface of the judgments. The area of law in which the difference between the duty and choice conceptions of the individual – and the judicial movement away from the former to the latter – is most apparent, is that concerning end of life decisions. However, judicial

¹³¹ Lord Chancellor HL Deb 3 November 1997 vol 582, col 1228; and F Klug 'The Human Rights Act 1998, *Pepper v. Hart* and all that' [1999] PL 246 at 247; and P Boateng and J Straw 'Bringing Rights Home: Labour's plans to incorporate the European Convention on Human Rights into UK law' [1997] 1 EHRLR 71 at 80.

¹³² Laws, above n 2, pp 7, 9, 22, 24-25, 30 & 57.

¹³³ Ibid, pp 6-9.

recognition and adoption of the choice foundation is not universal, and its implications are not yet fully realised.

Prior to the HRA the courts were most directly confronted by the conflict between duty and choice conceptions in the cases of *Airedale NHS Trust v Bland*¹³⁴ and *Re A (Children) (Conjoined Twins: Medical Treatment)*.¹³⁵ Here the limited capacities of the individuals in question for choice were crucial to the judge's finding that it was justifiable to bring about the end of their lives. This was a departure from the prevailing understanding of the principle of the sanctity of life, derived from the pre-Enlightenment religious perspective that an individual's life was a gift from God, which had led to the principle being interpreted as imposing a duty to preserve life which took no account of individual choice, rendering suicide unlawful until 1961.¹³⁶ Since the HRA, a line of cases concerning assisted suicide¹³⁷ has been the crucible in which the traditional UK duty conception of the individual has been directly challenged, and the courts have recognised with increasing openness the transformative effect of the choice centred conception of the individual as the basis the Convention rights.

Some Pre-HRA Judicial Application of a Choice-basis

In the Court of Appeal in *Bland*, Hoffmann LJ. (as he then was) explicitly engaged with the 'underlying moral principles' at issue in the case.¹³⁸ He felt it was necessary to do so because the legal and ethical issues, of whether it was right to withdraw life-sustaining treatment from

¹³⁴ [1993] AC 789 (HL).

¹³⁵ [2001] Fam 147.

¹³⁶ Suicide Act 1961, s 1; and *Nicklinson*, above n 9, at [90], cf [212] where Lord Sumption argued decriminalisation did not reflect a change in morality from duty to the maximisation of autonomy, but was done because it was felt that criminalising it was 'inhuman and ineffective.'

¹³⁷ *R (Pretty) v DPP* [2001] UKHL 61; *Purdy*, above n 8; *Nicklinson*, above n 9.

¹³⁸ *Bland*, above n 134, at 825; approved *Nicklinson*, above n 9, at [199] (Lord Wilson).

a person in a persistent vegetative state, could not be disentangled.¹³⁹ Hoffmann LJ. recognised that this case involved a direct conflict between the principles of the sanctity of life and the autonomy of Anthony Bland.¹⁴⁰ He however held that the sanctity of life did not impose a duty to keep Bland alive,¹⁴¹ and by considering how he would have wished to have been treated in his current position¹⁴² it was legitimate for the court to conclude that what ‘we think he would have chosen’ would be to be allowed to die.¹⁴³ Although the only judge to reason explicitly in these fundamental terms, the ultimate decision of the House of Lords, that the sanctity of life did not require he be kept alive with no chance of recovery,¹⁴⁴ is consistent with the deeper foundations for it that he set out.

Re A (conjoined twins) was decided 10 days before the HRA came into force. In this case the court was asked to rule on whether it would be lawful to separate two conjoined twins. Only one twin, Jodie, could survive the operation. Mary, whose heart and brain had limited function, and whose lungs had none, would die as a consequence. But if they were not separated, both would die within months as Jodie’s heart would fail.¹⁴⁵

The Court of Appeal felt itself to be caught between the principle of the sanctity of life, which prohibited causing the death of the weaker twin, and protecting the chance of the only twin who could live a full life to do so. Although Ward LJ. stated that the court was one of law not morals, he recognised that it was confronted with ‘seemingly irreconcilable conflicts of moral and ethical values.’¹⁴⁶ This appeared to be so because the Court of Appeal had to decide between competing conceptions of individual identity: whether to apply the duty-based interpretation of the sanctity of life which prohibited separation, or to maximise

¹³⁹ *Bland*, above n 134, at 825.

¹⁴⁰ *Ibid*, at 827.

¹⁴¹ *Ibid*, at 833.

¹⁴² *Ibid*, at 827 & 829-830.

¹⁴³ *Ibid*, at 803.

¹⁴⁴ *Ibid*, at 859.

¹⁴⁵ *Re A*, above n 135, at 155; and S Pattinson *Medical Law and Ethics* (London: Sweet and Maxwell, 4th edn, 2014) p 529.

¹⁴⁶ *Re A*, above n 135, at 155.

the opportunity for life of the only child who could one day fully develop their capacity to exercise choice.¹⁴⁷

All three judges noted the importance of the principle of the sanctity of life within the law, explicitly acknowledging its roots within the Common Law in the Judaeo-Christian religious duty to preserve life.¹⁴⁸ Each judge used different reasoning to conclude that, in spite of this, it would be lawful to separate the twins.¹⁴⁹ However, they all ultimately adopted approaches consistent with the application of a choice-based conception of the individual.

Each judge in turn argued that separation of the twins was justified in order to allow the only twin who could to live a life exercising freedom of choice to live to do so. Ward LJ., although noting that each twin had an equal right to life, held that:

Mary is ‘designated for death’ because her capacity to live her life is fatally compromised. The prospect of a *full life* for Jodie is counterbalanced by an acceleration of certain death for Mary. That balance is heavily in Jodie's favour. . . . [I]t is, in my judgment, impossible not to put in the scales of each child the manner in which they are individually *able to exercise* their right to life.¹⁵⁰

Brooke LJ., saw the case as requiring a choice between an argument that Mary’s life must not be unnaturally shortened by separation, and the argument that ‘it would be immoral not to assist Jodie if there is a good prospect that *she might live a happy and fulfilled life* if this operation is performed.’¹⁵¹ Influenced by the latter approach he interpreted the sanctity of life as protecting ‘the integrity of the human body’, and stated that the separation would give both twins their bodily integrity.¹⁵² Looking to the coming into force of the HRA in a few

¹⁴⁷ Ibid, at 239.

¹⁴⁸ Ibid, at 186-188 (Ward LJ), 211-212 (Brooke LJ) & 258 (Walker LJ).

¹⁴⁹ Pattinson, above n 145.

¹⁵⁰ *Re A*, above n 135, at 196 (my emphasis).

¹⁵¹ Ibid, at 239 (my emphasis).

¹⁵² Ibid, at 239.

days' time, he presciently concluded that this was an outcome which Article 8's protection for autonomy supported.¹⁵³

Walker LJ. also decided the case by reinterpreting the right to life to reflect the moral importance of the capacity to exercise choice. He held that

[e]ach twin's right to life includes the right to physical integrity, that is the right to a whole body over which the individual will, on reaching an age of understanding, *have autonomy and the right to self-determination*.¹⁵⁴

He stated that

[e]very human being's right to life carries with it, as an intrinsic part of it, rights of bodily integrity and autonomy—the right to have one's own body whole and intact and (on reaching an age of understanding) *to take decisions about one's own body*.¹⁵⁵

With this almost explicit application of a choice conception of individual identity, he held that the operation was in the best interests of both twins as it would 'give Jodie a reasonably good prospect of a long and reasonably normal life', and give Mary 'even in death, bodily integrity as a human being.'¹⁵⁶

Thus although in their judgments they rejected the idea of evaluating the value of life of the two twins,¹⁵⁷ their decisions to nonetheless support the separation were, at a fundamental level, motivated by the weight they attributed to their relative ability to live a life characterised by choice. This case thus demonstrates how duty and choice conceptions of the individual as the basis for substantive rights conflicted under the Common Law as well as the Convention rights. But more importantly, it shows the UK courts recognising and interpretively using a choice-basis to interpret the law and human rights.

¹⁵³ Ibid, at 240.

¹⁵⁴ Ibid, at 255 (my emphasis).

¹⁵⁵ Ibid, at 258 (my emphasis).

¹⁵⁶ Ibid, at 259.

¹⁵⁷ Ibid, at 187-188, 196 (Ward LJ), 214 (Brooke LJ) & 243 (Walker LJ).

Dialogue with the ECtHR

In the three key cases in which the courts have ruled on the legality of the provision of assistance to a terminally ill person to end their life, this conflict between the duty-based and the choice-based conceptions of the individual has been the underlying tension, and has led to different interpretations of the Convention rights. The progression of the judgments of our highest court shows a growing acceptance and application of a choice-based foundation for the Convention rights, through dialogue with the ECtHR and its interpretation of the basis of the Convention.

In the 2001 case of *R (Pretty) v DPP*¹⁵⁸ the House of Lords rejected the claim that Article 8 encompassed a right to be assisted to commit suicide. This conclusion was the consequence of the application of a duty-based interpretative approach. The Lords rejected Diane Pretty's argument that the Article 2 right to life protected her right to choose when to die as well as her right to live. They did so on the basis that it protected the 'sanctity of human life',¹⁵⁹ requiring its preservation from harm.¹⁶⁰ The Lords explicitly recognised that this conflicted with the view that the 'autonomy of individuals is predominant',¹⁶¹ in questions of rights, but held that consent could not override the protection of life in Article 2 and the legislative prohibition on assisted suicide.¹⁶² This view of the basis of Article 2, influenced the majority of the Lords' interpretation of Article 8 as also not being engaged by the facts. Although the Lords that recognised that Article 8 protected individual autonomous choice as to how to live,¹⁶³ they held that this did not extend to choosing how to die,¹⁶⁴ Lord Bingham

¹⁵⁸ Above n 137.

¹⁵⁹ Ibid, at [109] (Lord Hobhouse) see also: [5] (Lord Bingham), [59] (Lord Steyn) & [87] (Lord Hope).

¹⁶⁰ Ibid, at [109].

¹⁶¹ Ibid, at [54].

¹⁶² Ibid, at [110]-[111].

¹⁶³ Ibid, at [23] (Lord Bingham), [61] (Lord Steyn) & [100] (Lord Hope).

stating that to do so would undermine what it was supposed to protect.¹⁶⁵ Lord Hope came closest to recognising that Article 8's particular protection of individual choice engaged the right; considering that 'private life is engaged even where . . . she seeks to choose death rather than life', though he held its wording could not recognise a right to be assisted to commit suicide.¹⁶⁶

That the House of Lords was wrong – in failing to recognise and apply the basis of the Convention rights in the protection of the individual's capacity for choice – was made clear when Diane Pretty went to Strasbourg. The ECtHR agreed that the wording of Article 2 did not permit it to be interpreted as protecting a right to die.¹⁶⁷ However, beginning by clearly stating the choice-basis for the Convention,¹⁶⁸ the ECtHR relied upon it to find that Article 8 was engaged as it protected 'individual autonomy',¹⁶⁹ which it interpreted as encompassing the freedom 'to conduct one's life in a manner of one's own choosing'.¹⁷⁰ The ECtHR thus explicitly rejected the duty-based reasoning influential on the House of Lords, that to recognise the Convention as protecting a right to choose to die would go against the very purpose of the Convention rights.¹⁷¹ The Strasbourg court did not see this conclusion as contrary to the sanctity of life or Article 2, because the Convention's basis in the capacity for choice entailed that the value of continuing to live was determined by the choice of an individual themselves.¹⁷²

The ECtHR's intervention led the House of Lords in *R (Purdy) v DPP* to accept that Article 8 was engaged and violated by a failure of the DPP to give clear guidance on when

¹⁶⁴ Ibid, at [23] & [61].

¹⁶⁵ Ibid, at [18].

¹⁶⁶ Ibid, at [100].

¹⁶⁷ *Pretty*, above n 3, at [39].

¹⁶⁸ Above text to n 24; and *ibid*, at [65].

¹⁶⁹ *Pretty*, above n 3, at [61].

¹⁷⁰ Ibid, at [62].

¹⁷¹ Ibid, at [62] & [67].

¹⁷² Ibid, at [65].

someone would be prosecuted for assisting suicide.¹⁷³ The Lady and Lords accepted the ECtHR's decision in *Pretty* that protection for individual choice as to how to live their life underlies Article 8¹⁷⁴ and the Convention generally.¹⁷⁵

The gathering momentum of the domestic judicial recognition of the choice-basis of the Convention, can be seen in the most recent major case concerning the end of life. In *R (Nicklinson) v Ministry of Justice*¹⁷⁶ the parties challenged the laws prohibition on assisted suicide under Article 8. Lord Neuberger recognised and engaged directly with an underlying choice-basis, holding 'that the answer, both in law and in morality, can best be found by reference to personal autonomy.'¹⁷⁷ Lord Sumpton recognised both autonomy and the sanctity of life were moral principles which the law protects.¹⁷⁸ But consistent with seeing autonomy as underpinned by the fundamental capacity for choice he stated that: 'with no rational or utilitarian justification, [autonomy is] fundamental to our humanity' and was encapsulated within the principle 'that individuals are entitled to be the masters of their own fate.'¹⁷⁹ Lord Hughes took a very wide interpretation of Article 8, implying private life could encompass anything a person chose to do, with whether there was an enforceable right to do it depending on whether there were any competing Article 8(2) considerations which mitigated against it.¹⁸⁰ Lord Mance similarly recognised that whether there was a violation of Article 8 depended on the balance between autonomy and competing factors,¹⁸¹ which are united in protecting the free choice of people as to whether to die.¹⁸² Some of the Justices recognised that the principle of sanctity of life had a long history within the common law and international human rights law, however they held that autonomy conflicted with and

¹⁷³ *Purdy*, above n 8, at [53-54] & [56].

¹⁷⁴ *Ibid*, at [32], [38], [60], [61], [71] & [82].

¹⁷⁵ *Ibid*, at [38], citing *Pretty*, above n 3, [65].

¹⁷⁶ *Nicklinson*, above n 9.

¹⁷⁷ *Ibid*, at [95], see also [96]-[98].

¹⁷⁸ *Ibid*, at [208].

¹⁷⁹ *Ibid*, at [208].

¹⁸⁰ *Ibid*, at [263]; cf *Countryside Alliance*, above n 60, at [10]-[15] & [138]-[139].

¹⁸¹ *Nicklinson*, above n 9, at [160].

¹⁸² *Ibid*, at [171] (Lord Mance), [228]-[229] (Lord Sumpton) & [311] (Lady Hale).

overrode the law's previous understanding of it, as it had been held to do by the ECtHR in *Pretty*.¹⁸³ Thus the choice conception of the individual was the foundational interpretive principle in this case, though ultimately the majority held that it was constitutionally inappropriate for the Court to rule on whether Article 8 had been violated until after Parliament had taken the opportunity to reconsider the law.¹⁸⁴

Unresolved Underlying Tension

However, even in the context of Article 8, there is not yet universal acceptance within the judiciary of the choice-based understanding of the individual and recognition of its implications for the interpretation of rights. The consequences of this can be seen in the conflicting reasoning of the Supreme Court judgments in *Re JR38*,¹⁸⁵ and in the difference in approach between the High Court and the Court of Appeal in *R (Burke) v GMC*.¹⁸⁶

The Northern Irish case of *Re JR38* raised the question of whether the police's publication of photographs of a 14-year-old participating in a riot engaged his Article 8 rights. In the Supreme Court, Lords Toulson and Clarke, with both of whom Lord Hodge agreed without giving a separate judgment, held that the right was not engaged. Lord Toulson began by asking whether the claimant had a 'reasonable expectation of privacy' in relation to the activity in which he was engaged.¹⁸⁷ He naturally concluded that rioting 'is not the kind of activity which Article 8 exists to protect.'¹⁸⁸ He acknowledged that the underlying value protected by Article 8 was individual autonomy.¹⁸⁹ But by applying the 'reasonable

¹⁸³ Ibid, at [199] (Lord Wilson) & [209] (Lord Mance).

¹⁸⁴ Ibid, at [113] (Lord Neuberger), [188] (Lord Mance), [201] (Lord Wilson), [234] (Lord Sumption), [267] (Lord Hughes), [290] (Lord Clarke) & [297]-[298] (Lord Reed).

¹⁸⁵ *Re JR38* [2015] UKSC 42.

¹⁸⁶ [2004] EWHC 1879 (Admin); and [2005] EWCA Civ 1003.

¹⁸⁷ *Re JR38*, above n 185, at [86]-[88].

¹⁸⁸ Ibid, at [100].

¹⁸⁹ Ibid, at [97]-[98].

expectation' test of privacy in a way which focused in a narrow manner on the nature of the applicant's actions,¹⁹⁰ he did not have regard to the wider impact of the police's actions on the applicant's capacity to choose how to live.

In contrast Lord Kerr, with whom Lord Wilson agreed, argued that Article 8 was engaged. He rejected the narrow focus of Lord Toulson and instead looked to the fundamental basis of the right, in the protection of an individual's autonomy and construction of their 'identity and personal development',¹⁹¹ to determine when a person could reasonably expect privacy.¹⁹² Lord Kerr explicitly recognised this made Article 8 the Convention right with the 'broadest potential scope of application.'¹⁹³ Applying this basis to determine whether Article 8 was engaged he asked: what was the impact of the publication of the photographs on a 14 year old child's life, the development of his personality and future life choices? He held that it would impact these by its potential to stigmatise the child as a criminal,¹⁹⁴ and thus there was a reasonable expectation of privacy engaging his Article 8 right, though the impingement upon it was justified under Article 8(2).¹⁹⁵

In his deciding judgment on the question of whether Article 8 was engaged, Lord Clarke like Lord Kerr considered the implication of the publication on the child's identity more generally,¹⁹⁶ but unlike him felt the impact was of insufficient gravity to engage his Article 8 rights. He did not accept Lord Toulson's argument that without a reasonable expectation of privacy 'there is no relevant interference with personal autonomy so as to engage article 8.'¹⁹⁷ He considered, like Lord Kerr, whether the state's actions interfered with the child's autonomous development of their personality to decide whether Article 8 was

¹⁹⁰ Ibid, at [99]-[100].

¹⁹¹ Ibid, at [37], quoting *PG v UK* (2001) 46 EHRR 1272 at [56].

¹⁹² *Re JR38*, above n 185, at [38], [41] & [54], [56]-[57] & [64].

¹⁹³ Ibid, at [36].

¹⁹⁴ Ibid, at [50], [53] & [55].

¹⁹⁵ Ibid, at [63] & [78]-[80].

¹⁹⁶ Ibid, at [105] & [110].

¹⁹⁷ Ibid, at [110].

engaged; however he reached the conclusion that they did not and thus held Article 8 did not prohibit the publication.¹⁹⁸ Lord Clarke's analytical approach and acknowledgement of the broad scope of Article 8 is thus in agreement with Lord Kerr's, though he reached a different conclusion on applying it to the facts.

Lord Toulson's narrow approach failed to adequately recognise or engage with the deeper basis of the Convention rights, of which Article 8 is the raw manifestation, in protecting individuals' capacity for choice as to how to live though which they define themselves. His approach is therefore inconsistent with the fundamental basis of Article 8 recognised by the ECtHR in *Pretty v UK* and the domestic decisions in *Purdy* and *Nicklinson*. Lord Kerr and Lord Clarke's approach applies and is consistent with the basis of Article 8 and the Convention rights more generally. Lord Hodge, in claiming to fully agree with both Lord Toulson and Clarke, did not engage with the fundamental issue distinguishing the two judgments. More widely, this case shows the application of the choice basis outside of cases concerning end of life decisions, but also that there is not universal recognition and agreement within the Supreme Court as to the nature of the fundamental basis of the Convention rights and its role in determining the scope of the rights.

The tension between a choice and duty basis for rights has been recognised by Shaun Pattinson¹⁹⁹ as the key distinction between the High Court and Court of Appeal decisions in *Burke*. Oliver Burke, who suffered from a degenerative brain condition, challenged the Convention compatibility of GMC guidelines, which would allow artificial nutrition and hydration to be withdrawn from him in the event his illness reduced him to a conscious but 'locked in' mental state, where he could not communicate his treatment wishes.

In the High Court, Munby J interpreted Articles 2, 3 and 8 in a manner which gave effect to a choice-basis for the Convention. He used both the Common Law, relying in

¹⁹⁸ Ibid, at [113]-[115].

¹⁹⁹ S Pattinson 'Contemporaneous and Advance Requests: The Fight for Rights at the End of Life' in J Herring and J Wall *Landmark Cases in Medical Law* (Oxford: Hart, 2015) pp 255–269.

particular on Hoffmann LJ's decision in *Bland*,²⁰⁰ and the Convention, as interpreted using the choice-based approach taken in *Pretty v UK*, to derive a set of principles to guide his judgment on when a patient has a right to life-prolonging treatment.²⁰¹ Whilst these included sanctity of life and dignity, he ultimately applies a choice-basis to interpret the Convention rights.²⁰² 'Important as the sanctity of life is, it has to take second place to personal autonomy...'.²⁰³ Although he treated autonomy and dignity as distinct in also saying that '[sanctity of life] may have to take second place to human dignity', his conceptualisation of dignity presupposes a choice-basis for it, as he describes dignity as requiring medical treatment to safeguard 'mental stability' and to protecting the patient from dying in a manner that *the patient* finds excessively distressing.²⁰⁴

The Court of Appeal, in contrast with the High Court, but in line with the UK's historically prevailing duty conception of the individual, relied only on common law authorities to support a judgement setting out the law in terms of the duties it imposes on the medical profession to provide ANH.²⁰⁵ Whereas Munby J concluded that Burke 'had the right to insist on receiving life-prolonging ANH, the Court of Appeal concluded that Burke would merely be the beneficiary of a duty to provide such treatment': he had a right to refuse it, but not to choose it.²⁰⁶

The influence of the ECtHR statement of the choice-based foundation in *Pretty* forced the Supreme Court in *Purdy* and *Nicklinson* to apply an understanding of the individual defined by the capacity to choose how to live to interpret the Convention. The application of this basis can also be seen in the judgments of some members of the judiciary in non-end of

²⁰⁰ A case in which he was counsel for the Official Solicitor acting as guardian ad litem.

²⁰¹ *Burke* EWHC, above n 186, at [130], [166] & [178].

²⁰² *Ibid*, at esp [73]-[75] & [166] and Pattinson, above n 199, p 259.

²⁰³ *Burke* EWHC, above n 186, at [80].

²⁰⁴ *Ibid*.

²⁰⁵ *Burke* EWCA Civ, above n 186, at [39]-[40]; and Pattinson, above n 199, pp 258 & 260.

²⁰⁶ Pattinson, above n 199, p 260.

life cases.²⁰⁷ However, *Burke* and *JR38* show the continuing existence and interpretive consequences of the fundamental disagreement underlying the domestic courts' interpretations of the Convention rights. Thus far only some members of the judiciary have recognised and given effect to the acceleration in the movement from a duty to a choice conception of the individual, which began with the Enlightenment and whose recognition is now mandated by the ECtHR's interpretation of the Convention. Through their development of the Common Law and the modifications they have made and threatened to the core constitutional principles of parliamentary sovereignty and the rule of law, through the presumption of liberty and in cases such as *Jackson*, the courts as guardians of the UK Constitution have given some effect to the Enlightenment ideals, steering the Constitution's gradual evolution from its historical duty-basis. The HRA, through the ECtHR's interpretation of the Convention rights, presents a challenge to the remaining influence of the duty conception of the individual within the UK Constitution and judicial reasoning. The courts have responded to this but the new conception of the individual, the true Enlightenment culture of rights, has not yet been fully accepted by the judiciary.

Conclusion

The stated intention behind the creation of the HRA was to give domestic judicial protection to the Convention rights and to create a culture of rights within the UK.²⁰⁸ The controversy and dissatisfaction the Act has generated, the calls for its repeal, amendment or replacement, indicate that the original goals have not been securely achieved. The fundamental reason for

²⁰⁷ For example: *Re G (Children)* [2012] EWCA Civ 1233 at [60], [80] & [82] (Munby LJ giving judgment for the court); *A v Secretary of State for the Home Department* [2004] UKHL 56 at [81] (Lord Nicholls), cf [191] (Lord Walker); and *Ghaidan v Godin Mendoza* [2004] UKHL 30 at [17] (Lord Nicholls) & [132] (Lady Hale).

²⁰⁸ Above n 131.

the Act's precarious position is that it has become a lightning rod for a conflict between two fundamentally distinct conceptions of the individual.

The ECtHR has held that the Convention, in line with human rights norms declared since the Enlightenment, is inalienably grounded in and protects a conception of the individual as possessing the capacity to choose how to live and through choosing to shape their identity. In contrast, as a result of the continuity of the UK Constitution over the last thousand years, there has never been a clear moment in which this conception of the individual has been recognised across the UK as the foundation of our society and our law. There has only been a gradual but incomplete erosion of the historic conception of the individual as defined by the duties they owe, which formed the justifying foundation of the divine right of kings, and the basis from which parliamentary sovereignty and the rule of law evolved. Although legislation and judicial decisions have given increasing recognition to the idea that the individual is defined by their capacity for choice, the HRA combined with the ECtHR's jurisprudence present a revolutionary challenge to the continuing influence of the duty-based conception of the individual which has long formed the foundation of the UK Constitution.

The UK judiciary are beginning to acknowledge and give effect to the distinct basis of the Convention rights. The end of life cases show a recognition of the capacity for choice as the nature of the individual which the Convention rights protect. However, *Re JR38* and *Burke* demonstrate that recognition of the distinct fundamental basis of the Convention rights is not yet universal amongst the judiciary.

If the Convention rights are to be accepted and applied in the UK, in a way consistent with their fundamental nature as recognised by the ECtHR and within other human rights documents, there must be more than their legislative incorporation or amendment. It must be recognised that they bring with them a fundamental assumption about the nature of the

individual, from which they derive and which they protect. Until this basis for rights and the challenge it brings to the historical fundamental foundation of the UK Constitution is more widely accepted, rights protection and particularly Article 8 will face hostility. Any new bill of rights which emphasises responsibilities and duties will not represent the fuller acceptance of the Convention into the UK, it will rather enshrine the rejection of the fundamental basis of human rights.